In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-9831

JOEL ANTHONY LILES and
RALPH ALEXANDER BREMNER,

Petitioners,

v.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-.....

JOEL ANTHONY LILES and
RALPH ALEXANDER BREMNER,

Petitioners,

v.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

The petitioners, Joel Anthony Liles and Ralph Alexander Bremner, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on July 14, 1975.

OPINION BELOW

The opinion of the Court of Appeals of the State of Oregon is reported at Vol. 75 Oregon Advance Sheets, p. 2614.

No opinion was rendered by the Circuit Court of

the State of Oregon, the trial court or by the Supreme Court of the State of Oregon in denying discretionary review.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on July 14, 1975. A timely petition for review by the Supreme Court of Oregon was denied on October 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a state obscenity statute combined with its definitions is too broad and inspecific to cover "hard core pornography" and so is a violation of the First Amendment.

2. When the trial judge interpreted the standard of the statute as one of a "small child with his mother by his side" in convicting petitioners, may the appellate court affirm the convictions on another interpretation.

APPLICABLE UNITED STATES CONSTITUTIONAL PROVISIONS

First Amendment

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the government for a redress of grievances.

Applicable Oregon Statutes:

Oregon Laws 1973, Chapter 699:

". . .

"Section 4(1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

"(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks a serious literary, artistic, political or scientific value.

"(3) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.

"(4) No employe is liable to prosecution under this section or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scope of his regular employment at a showing open to the public.

"(5) As used in this section, 'employe' means an employe as defined in subsection (3) of ORS 167.075.

"(6) Disseminating obscene material is a Class A misdemeanor.

". . .

"OBSCENITY AND RELATED OFFENSES

"167.060 Definitions for ORS 167.060 to 167.095. As used in ORS 167.060 to 167.095, unless the context requires otherwise:

". . .

"(9) 'Sado-masochistic abuse' means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physicaly restrained on the part of one so clothed.

"(10) 'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

"(11) 'Sexual excitement' means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation or the sensual experiences or humans engaging in or witnessing sexual conduct or nudity."

Rules of Procedure of Oregon Supreme Court and Court of Appeals noticed in Opinion of Court of Appeals:

Rule 6.55

BRIEFS IN CRIMINAL AND POST-CONVICTION CASES

So far as practicable the rules with respect to briefs in civil cases shall apply to criminal and post-conviction cases. In all criminal cases the indictment or information shall be set forth verbatim in appellant's statement of the case, rather than in the abstract. The indictment or information as so set forth shall include citation of the statute under which the charge was brought.

Rule 6.18

ASSIGNMENTS OF ERROR IN ACTIONS AT LAW

In appeals in actions at law, no alleged error of the trial court will be considered on appeal unless regularly assigned as error in the appellant's (or cross-appellant's) opening brief, except that

the appellate court may take notice of errors of law apparent on the face of the record.

Each asignment of error shall be clearly and succinctly stated under a separate and appropriate heading. The assignment of error must be specific and must set out verbatim the pertinent portions of the record. Assignments of error which the court can consider only by searching the record for the proceedings complained of will not be considered.

The arrangement and wording of assignments of error so far as applicable, together with reference to page of the transcript or narrative statement, shall conform to illustrations in Appendix D.

Where several assignments of error present essentially the same legal question, they shall be combined so far as practicable.

STATEMENT OF THE CASE

This petition is from consolidated appeals from a consolidated trial of two persons charged with violating the new Oregon obscenity statute by selling motion picture films in which they were convicted after trial by a judge without a jury and each sentenced to 30 days in jail and a $1,000 fine.

The constitutionality of the statute was raised on motion in arrest of judgment in the trial court, an appropriate method under Oregon law, as follows:

> "Defendant moves in arrest of judgment on the ground that it appears upon the face of the

> indictment that the facts stated do not constitute a crime.
>
> . . .
>
> "*Specification of Points:*
>
> "*Chapter 699, Section 4, Oregon Laws 1973,* combined with the definitions of *ORS 167.060* are too broad and inspecifically defined so as to be invalid under the freedom of speech and the press sections of the *First Amendment to the United States Constitution, adapted to the States by the due process clause, section 1, Fourteenth Amendment to the United States Constitution. . . .*".
>
> "THE COURT: . . .
>
> " 'Well, what is patently offensive?'
>
> "And, frankly, I had to kind of apply my own standard, which, I believe, corresponds with the standards of the community. And the standard probably, simply stated and boiled down, is the same one that was taught to me by my mother from the day I was a small child. If there was something of which I would not want her to know, then don't do it. Pretty simple.
>
> "Applying that standard I would think that I wouldn't get any quarrel out of anyone in this room, that they wouldn't want their mothers sitting next to them while they looked at either one of those movies. They are patently offensive.
>
> ". . . .
>
> "IT IS ORDERED that defendants' motion in arrest of judgment be and the same is hereby denied."

This was pursued in the Court of Appeals by Assignment of Error II as follows:

ASSIGNMENT OF ERROR II

The trial court erred in overruling the following motion in arrest of judgment:

"Defendant moves in arrest of judgment on the ground that it appears upon the face of the indictment that the facts stated do not constitute a crime.

. . .

"*Specification of Points:*

"*Chapter 699, Section 4, Oregon Laws 1973,* combined with the definitions of *ORS 167.060* are too broad and inspecifically defined so as to be invalid under the freedom of speech and the press sections of the *First Amendment to the United States Constitution, adapted to the States by the due process clause, section 1, Fourteenth Amendment to the United States Constitution. . . .*"

"THE COURT: . . .

" 'Well, what is patently offensive?'

"And, frankly, I had to kind of apply my own standard, which, I believe, corresponds with the standards of the community. And the standard probably, simply stated and boiled down, is the same one that was taught to me by my mother from the day I was a small child. If there was something of which I would not want her to know, then don't do it. Pretty simple.

"Applying that standard I would think that I

wouldn't get any quarrel out of anyone in this room, that they wouldn't want their mothers sitting next to them while they looked at either one of those movies. They are patently offensive.

". . . .

"IT IS ORDERED that defendants' motion in arrest of judgment be and the same is hereby denied."

ARGUMENT

When combined with the definitions of ORS *167.060, Chapter 699, Section 4, Oregon Laws 1973,* is too broad and inspecific to be limited to "hard-core pornography" on its face, and so is a violation of the First Amendment. *Jenkins* v. *Georgia,* 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 590 (1974); *Miller* v. *California,* 412 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

However, as the "standard" was construed by the trial judge, it is obviously unconstitutional. The "small child with his mother by his side" standard (Tr. p. 12-13).

In passing on this case, this Court is limited to this interpretation of the statute applied by the trial court and must affirm or reverse on appeal on that interpretation. *Cole* v. *Arkansas,* 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948); *Gregory* v. *City of Chicago,* 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969); *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965); *Bouie* v.

City of Columbia, 387 U.S. 457, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

The Oregon Court of Appeals in its opinion (Appendix p. 1), held the statute constitutional on its face but would not pass upon the standard under the interpretation of the trial judge — "the small child with his mother by his side," claiming it had not been assigned as error in accordance with its Rules of Procedure.

Petition for discretionary review was filed in the Supreme Court of Oregon, raising the same issues and rehearing was denied in the Oregon Court of Appeals, and review denied in the Supreme Court without opinion.

REASONS FOR GRANTING THE WRIT

The Oregon Court of Appeals has here determined federal questions of substance in a way not in accord with applicable decisions of this Court.

ARGUMENT

These definitions in *ORS 167.060* make Oregon Laws 1973, Chapter 699 Section 4 (the new Oregon obscenity law) on its face much too broad and inspecific to be constitutional.

For example "sexual conduct" as defined could encompass a touching of persons fully clothed and the "apparent sexual stimulation" could be entirely in the eyes of the beholder.

Surely this covers more than "hard core pornography." *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Miller* v. *California*, 412 U.S. 15 (1973).

Furthermore, as the "standard" was interpreted by the trial judge, "the small child with his mother by his side," it is obviously unconstitutional. The Oregon Court of Appeals could only affirm the conviction on the trial judge's interpretation under which the conviction was obtained, and could not do so on a different statutory interpretation. *Cole* v. *Arkansas*, 333 U.S. 196 (1948); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 92 (1965); *Bouie* v. *City of Columbia*, 387 U.S. 457 (1964).

The whole Assignment of Error II is set out above to show that petitioners did clearly raise this federal issue in the Court of Appeals despite that Court's assertion to the contrary.

This is itself a Federal question for the Supreme Court of the United States itself to determine. *Street* v. *New York*, 394 U.S. 576, 583 (1969).

CONCLUSION

For these reasons, a writ should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

State of Oregon,

Respondent,

No. C 75-01-0209 Cr

v.

Joel Anthony Liles,

Appellant.

State of Oregon,

Respondent,

No. C 75-01-0211 Cr

v.

Ralph Alexander Bremner,

Appellant.

Appeal from Circuit Court, Multnomah County.

Pat Dooley, Judge.

Argued and submitted June 17, 1975.

Howard R. Lonergan, Portland, argued the cause and filed the brief for appellants.

W. Michael Gillette, Solicitor General, Salem, argued the cause for respondent. With him on the brief was Lee Johnson, Attorney General, Salem.

Before Schwab, Chief Judge, and Foley and Fort, Judges.

FOLEY, J.

Affirmed.

FOLEY, J.

Defendants were indicted for dissemination of obscene material, Oregon Laws 1973, ch 699, § 4, pp 1593-94, and convicted in a consolidated trial by a judge without a jury. In this consolidated appeal defendants assert that the trial court erred (1) in overruling a demurrer to the indictments and (2) in overruling a motion in arrest of judgment.

Defendants' demurrer to the indictments was based on the contention that Oregon Laws 1973, ch 699,[1] embraces more than one subject in violation of Art IV, § 20 of the Oregon Constitution. Article IV,

[1] Adopted by the people in a referendum held in November 1974, ch. 699 has not yet been written into the Oregon Revised Statutes by the Legislative Council Committee of the Legislature.

Oregon Laws 1973, ch. 699, provides:

"*Section 1.* Sections 2 to 4 of this Act are added to and made a part of ORS 167.060 to 167.095.

"*Section 2.* As used in this 1973 Act unless the context requires otherwise:

"(1) 'Live public show' means a public show in which human beings, animals, or both appear bodily before spectators or customers.

"(2) 'Public show' means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded.

"*Section 3.* (1) It is unlawful for any person to knowingly engage in sadomasochistic abuse or sexual conduct in a live public show.

"(2) Violation of subsection (1) of this section is a Class A misdemeanor.

"(3) It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sadomasochistic abuse or sexual conduct.

"(4) Violation of subsection (3) of this section is a Class C felony.

"*Section 4.* (1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

"(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value.

"(3) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.

"(4) No employe is liable to prosecution under this section or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scobe of his regular employment at a showing open to the public.

"(5) As used in this section, 'employe' means an employe as defined in subsection (3) of ORS 167.075.

"(6) Disseminating obscene material is a Class A misdemeanor.

"Section 5. ORS 167.002 is amended to read:

"167.002. As used in ORS 167.002 to 167.027, unless the context requires otherwise:

"(1) 'Place of prostitution' means any place where prostitution is practiced.

"(2) 'Prostitute' means a male or female person who engages in sexual conduct *or sexual contact* for a fee.

"(3) 'Prostitution enterprise' means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

§ 20 is directed against "log-rolling"[2] in that it provides:

> "Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. . . .
> ". . . . . "

The basis of defendants' contention is that Sections 1 to 4 of ch. 699 relate to the obscenity provisions of ORS 167.060 to 167.095 whereas Sections 5 and 6 relate to prostitution provisions of ORS 167.002 to 167.027 *(see* n. 1, supra).

The words " 'matters properly connected therewith' " in Art. IV, § 20 "include every matter germane to and having a natural connection with the general subject of the act. . . ." Lovejoy v. Portland, 95 Or 459, 466-67, 188 P 207 (1920). We think the various sections of ch 699 do not violate the log-rolling prohibition in that they are "germane to" and have "a natural connection with the general subject" of criminal conduct in the area of sex and its depiction. *See* Foeller v. Housing Authority of Portland, 198 Or 205, 257-58, 256 P2d 752 (1953); State v. Laundy, 103 Or 443, 204 P 958, 206 P 290 (1922).

In their motion in arrest of judgment defendants contend that the facts stated in the indictments[3] do not constitute an offense. ORS 136.500 and 135.630 (4). Defendants do not attack the indictments as such, but contend the indictments are based on statutes

"(4) 'Sexual conduct' means sexual intercourse or deviate sexual intercourse.

"(5) *'Sexual contact' means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.*

"Section 6. ORS 167.007 is amended to read:

"167.007. (1) A person commits the crime of prostitution if:

(a) He engages in or offers or agrees to engage in sexual conduct *or sexual contact* in return for a fee [.]; *or*

"(b) He pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.

"(2) Prostitution is a Class A misdemeanor." (Brackets in original.)

[2] ". . . This section of the Constitution was designed to do away with the several abuses, among which was the practice of inserting in one bill two or more unrelated provisions so that those favoring one provision could be compelled, in order to secure its adoption, to combine with those favoring another provision, and by this process of log-rolling the adoption of both provisions could be accomplished, when neither, if standing alone, could succeed on its own merits. . . ." Lovejoy v. Portland, 95 Or. 459, 465, 188 P. 207 (1920).

[3] The indictment reads as follows:

". . . . . .

"The said defendant [Joel Anthony Liles], on or about December 27, 1974, in the County of Multnomah, State of Oregon, did unlawfully and knowingly sell an obscene motion picture, to-wit: 'You'll Like It' (handwriting stating '2 Male Gay Experiment'), to Edward M. May, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

". . . . . "

". . . . . .

"The said defendant [Ralph Alexander Bremner], on or about December 27, 1974, in the County of Multnomah, State of Oregon, did unlawfully and knowingly sell an obscene motion picture, to-wit: 'Beautiful Piece,' to Michael Hentschell, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

". . . . . "

No question was raised as to the definiteness and certainty of the allegations contained in the indictments and we express no opinion thereon.

(Oregon Laws 1973, ch 699, § 4, and the related definitions contained in ORS 167.060) which are overbroad and vague, thus violating the First Amendment to the United States Constitution, and for this reason the facts stated in the indictments do not charge an offense.

In is brief the state succinctly discusses the relation of obscenity to vagueness and overbreadth doctrines:

> ". . . . .
>
> "The U. S. Supreme Court held in *Roth* v. *U.S.*, 354 U.S. 476, 77 S Ct 1304, 1 LEd2d 1498 (1957) that the States could prohibit obscenity because obscenity is not protected by the First Amendment to the U. S. Constitution. However, state obscenity statutes have been subject to attack on two grounds. First, because they are overbroad, prohibiting expression which is not obscenity, but is still protected by the First Amendment. Such overbroad statutes are invalid for prohibiting protected expression. Second, because they are too vague. Vague statutes violate an alleged offender's due process rights under the Fourteenth Amendment to the U. S. Constitution since [he is] unable to ascertain what is unlawful under the statute and because enforcement officials can be arbitrary in picking behavior for prosecution under such a statute. Vague statutes are also invalid due to the 'chilling effect' they have on the exercise of expression protected by the First Amendment.
>
> "To meet both defects of overbroadness and vagueness, the U. S. Supreme Court has established and refined a standard of what is obscene and can be prohibited by the states. . . .
>
> ". . . . . "

The most recent comprehensive statement of that standard was made in Miller v. California, 413 US 15, 93 S Ct 2607, 37 L Ed 2d 419 (1973). The Supreme Court continues to refine and apply the *Miller* standards. *See, e.g.*, Jenkins v. Georgia, 418 US 153, 94 S Ct 2750, 41 L Ed 2d 642 (1974); Hamling v. United States, 418 US 87, 94 S Ct 2887, 41 L Ed 2d 590 (1974). The *Miller* opinion summarized the standards for statutes designed to regulate obscene materials:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct *specifically defined by the applicable state law;* and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . ." (Emphasis supplied.) 413 US at 24.

The pertinent portions of Oregon Laws 1973, ch 699, § 4, pp 1593-94 (hereafter Section 4), provide:

> "(1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture,

motion picture, films, slides, drawings or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

"(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value.

". . . . . ."

Subsection (2)(b) of Section 4 follows guideline (a) of *Miller* with the additional refinement (as approved in Hamling v. United States, supra) that "community" standards need not be national standards. Subsection (2)(c) of Section 4 clearly follows guideline (c) of *Miller*.

The remaining question is whether subsection (2)(a) falls within guideline (b) of *Miller*. The reference in subsection (2)(a) to matter which "depicts or describes in a patently offensive manner" is virtually the same as that in *Miller* guideline (b). The issue, then, is whether sexual conduct is sufficiently "specifically defined" as required by *Miller* guideline (b). *Miller* gave "a few plain examples of what a state statute could define for regulation" under guideline (b):

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 US at 25.

The Supreme Court has since noted that these examples "did not purport to be an exhaustive catalog" but that they do "fix substantive constitutional limitations." Jenkins v. Georgia, supra, 418 US at 160.

Section 4 is "added to and made a part of ORS 167.060 to 167.095" by Oregon Laws 1973, ch 699, § 1, p 1593. ORS 167.060 contains the following definitions:

". . . . .

"(9) 'Sado-masochistic abuse' means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"(10) 'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

". . . . . ."

These definitions were enacted as part of Oregon Laws 1971, ch 743, §§ 255-262, pp 1937-41, which was cited as one of two "examples of state laws directed at depiction of defined physical conduct, as opposed to expression" in n 6 of Miller v. California, supra, 413 US at 24. Footnote 6 was a reference to the requirement, in the body of the *Miller* opinion, that sexual conduct "must be specifically defined by the applicable state law. . . ." 413 US at 24. Thus, Section 4 incorporates a definition of sexual conduct and sadomasochistic abuse which has been impliedly cited as fulfilling the specificity requirements of *Miller*. Even absent the n 6 reference, the definitions of sexual conduct and sadomasochistic abuse are specifically and narrowly drawn so as to be well within the "substantive constitutional limitations" set out in *Miller* guideline (b).

We are, therefore, satisfied that Section 4 follows the guidelines of Miller v. California, supra, as to what may be defined and regulated as "obscenity." Since Section 4 meets the *Miller* standards as refined and defined in Jenkins v. Georgia, supra, and Hamling v. United States, supra, we hold it is not in violation of the First Amendment to the U. S. Constitution.

Defendants make a further argument that the trial judge erred in the standards he followed in applying the obscenity statute to the facts of this case. This was not raised as an assignment of error as required by Procedure Rules 6.18 and 6.55 of this court.

Affirmed.

INDICTMENTS

Indictment (Liles — Chapter 699, Section 4, Oregon Laws 1973)

"The above-named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of

DISSEMINATION OF OBSCENE MATERIAL

committed as follows:

"The said defendant, on or about December 27, 1974, in the County of Multnomah, State of Oregon, did unlawfully and knowingly sell an obscene motion picture, to-wit: 'You'll Like It' (handwriting stating '2 Male Gay Experiment'), to Edward M. May, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

Indictment (Bremner — Chapter 699, Section 4, Oregon Laws 1973):

"The above-named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of

DISSEMINATION OF OBSCENE MATERIAL

committed as follows:

"The said defendant, on or about December 27, 1974, in the County of Multnomah, State of Oregon, did unlawfully and knowingly sell an obscene motion picture, to-wit: 'Beautiful Piece,' to Michael Hentschell, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

STATE OF OREGON
COURT OF APPEALS

JOEL ANTHONY LILES
RALPH ALEXANDER

STATE OF OREGON, Respondent, v. JOEL ANTHONY LILES, Appellant.	)	JUDGMENT and MANDATE
STATE OF OREGON Respondent, v. RALPH ALEXANDER BREMNER, Appellant.	)	Appeal from Multnomah County No. C 75-01-0211 Cr

This cause having come on to be heard on appeal and having been duly submited and considered:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant damages, costs and disbursements in this court in the amount of $7.50.

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered July 14, 1975.

ISSUED at Salem, Oregon. October 16, 1975.

STATE OF OREGON
IN THE COURT OF APPEALS

August 20, 1975

Case Title: STATE v. LILES/BREMNER
Howard R. Lonergan
Attorney at Law

The Court of Appeals has today declined to reconsider its decision in the above-entitled matter.

cc: W. Michael Gillette
Supreme Court

STATE COURT ADMINISTRATOR

By_____
Mrs. Florence Aspinwall

STATE OF OREGON
SUPREME COURT

Mandate

STATE OF OREGON, Respondent,	)	Appeal from Multnomah County
v.	)	C 75-01-0209
JOEL ANTHONY LILES, Appellant.	)	On Petition for Review
STATE OF OREGON Respondent,	)	Appeal from Multnomah County
v.	)	C 75-01-0211
RALPH ALEXANDER BREMNER, Appellant.	)	On Petition for Review

The court having duly considered appellants' petition for review, and being fully advised therein,

IT HEREBY IS ORDERED that said petition is denied.

ENTERED at Salem, Oregon, this 14th day of October, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-983

JOEL ANTHONY LILES and
RALPH ALEXANDER BREMNER,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioners' statement is accepted.

JURISDICTION

Petitioners' statement is accepted.

QUESTIONS PRESENTED

1. Whether Oregon's obscenity statute combined with its definitions is too broad and inspecific and so is in violation of the First Amendment.

2. Whether a portion of the decision of the Oregon

Court of Appeals turned upon a valid state procedural ground, and thus is not subject to review in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' statement is accepted.

OREGON STATUTORY PROVISIONS INVOLVED

Petitioners' statement is accepted.

OREGON RULES OF PROCEDURE INVOLVED

Petitioners' statement is accepted.

STATEMENT OF THE CASE

Petitioners' statement is accepted.

REASONS FOR DENYING THE WRIT

Petitioners seek the issuance of a writ of certiorari based upon an alleged error of constitutional dimensions in the trial judge's denial of their motion in arrest of judgment. ORS 136.500 and ORS 135.630 provide for the remedy of arrest of judgment and designate the *exclusive* grounds for the remedy:

ORS 136.500 provides:

> "A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty. It may be founded on either or both of the grounds specified in subsections (1) and (4) of ORS 135.360, *and not otherwise*. . . ." (Emphasis supplied).

ORS 135.630 provides:

> "The defendant may demur to the accusatory instrument when it appears upon the face thereof:
>
> "(1) If the accusatory instrument is an indictment, that the grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;
>
> ". . . .
>
> "(4) That the facts stated do not constitute an offense; . . . ."

Petitioners based their motion in arrest of judgment on ORS 135.630(4), claiming that the facts stated in the indictment do not constitute an offense. This argument is in turn based on the contention that ORS 167.060(10) and Oregon Laws 1973, ch 699, §4 are overbroad and in violation of the First Amendment.

This Court held in *Roth v. United States*, 354 US 476 (1957) that the states could prohibit obscenity because obscenity is not protected by the First Amendment to the United States Constitution. However, state obscenity statutes have been subject to attack on two grounds: First, because they are overbroad, prohibiting expression which is not obscenity but is still protected by the First Amendment; such overbroad statutes are invalid for prohibiting protected expression. Second, because they are too vague; vague statutes violate an alleged offender's due process rights under the Fourteenth Amendment to the United States Constitution since the offender is unable to ascertain what is unlawful under the statute, and because enforcement officials can be arbitrary in picking behavior for prosecution

under such a statute. Vague statutes are also invalid due to the "chilling effect" they have on the exercise of expression protected by the First Amendment.

To meet both defects of overbroadness and vagueness, this Court has established and refined a standard of what is obscene and can be prohibited by the states. In *Roth, supra,* this Court held that obscenity was not protected by the First Amendment because it was utterly without redeeming social value. The test to determine whether material was obscene (which meant both that it could, as a matter of constitutional law, be prohibited, and whether it was, as a question of fact, prohibited by the state statute) was

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." (Footnote omitted). *Roth v. United States, supra,* 354 US at 489.

After *Roth,* many courts used "utterly without redeeming social value" as a prerequisite for a finding of obscenity and in *Memoirs v. Massachusetts,* 383 US 413 (1966), three members of this Court held the standard of what is obscenity to be that

> ". . . it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 US at 418.

Many states enacted statutes adopting either the *Roth* or the *Roth-Memoirs* standard.

In *Miller v. California,* 413 US 15 (1972) this Court reassessed its previous decisions and decided that to prove material was "utterly without redeeming social value" placed too great a burden on the prosecution. *Miller, supra,* 413 US at 22. Five justices joined in reaffirming *Roth* and held the standard to be applied by the trier of fact to be

> ". . . (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . ." *Miller v. California, supra* 413 US at 24.

"Sexual conduct specifically defined" could be defined by statute or construed by the state courts.

> ". . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. n. 6 . . .
>
> "———————
>
> "n. 6 See, *e.g.,* Oregon Laws 1971, c. 743, Art. 29, §§255-262, (which includes ORS 167.060(10)) [citations omitted] as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be under-

stood as approving of them in all other respects nor as establishing their limits as the extent of state power.

"*We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate.* [citations omitted]." *Id.* (Emphasis supplied).

Since Oregon Laws 1973, ch 699 §4(2) adopts the *Miller* language for obscenity, there can be no question that the standards to be applied are constitutional. Petitioners, therefore, must base their argument of overbreadth on the one aspect of the *Miller* requisites that this Court did not set out verbatim, *viz*, the definition of sexual conduct which state law must include.

However, this Court *did* cite the Oregon definition with approval as an example of a valid formulation in the context of obscenity regulation per se, not obscenity regulation for minors only. With the implied approval of the statute in *Miller*, there should be no question of the constitutional adequacy of that definition.

Even if petitioners did not have the hurdle of this Court's express approval in *Miller*, their argument must fail before this Court's examples of what can be defined for regulation:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain *examples* of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

"(a) Patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals." *Id*, at 25. (Emphasis supplied).

These were intended as mere examples and were not meant to be exhaustive. *Hamling v. United States,* 418 US 87 (1974); *Jenkins v. Georgia,* 418 US 153 (1974). But as examples of "hard core pornography" they are directed at the same type of conduct as defined in ORS 167.060(10):

"'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic area or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals *in an act of apparent sexual stimulation or gratification.*" (Emphasis supplied).

To be criminal, a depiction of such conduct must be "patently offensive" under Oregon Laws 1973, ch 699, §4(2). Any touching of the buttocks or female breasts must be "in an act of apparent sexual stimulation or gratification," and as such would be a "sexual act." Therefore, under Oregon's statutory scheme, touching the buttocks or female breasts must be depicted as a patently offensive sexual act. The depiction of conduct that petitioners contend cannot be constitutionally regulated falls within the examples of hard core pornography given by this Court in *Miller* as examples of what *can* be regulated. The Court of Appeals so construed it.

Oregon's definition of "sexual conduct" is limited to

"hard core pornography" and is valid under *Miller*. Indeed, even the course of many states with statutes embodying the older *Roth* or *Roth-Memoirs* test has been for the state's supreme court to construe their statute to be limited by *Miller* and uphold the convictions thereunder. *See Pierce v. State*, 292 Ala 473, 296 S2d 218 (1974), *cert den* 419 US 1130 (1975); *Herman v. State*, 256 Ark 840, 512 SW2d 923 (1974); *cert den* 420 US 953 (1975); *Price v. Commonwealth*, 214 Va 490, 201 SE2d 798, *cert den* 419 US 902 (1974); *People v. Kaplan*, — Cal Rptr ——, — CA3d ——, *cert den*, 419 US 915 (1974); *Slaten v. Paris Adult Theatre I*, 231 Ga 312, 201 SE2d 456 (1973), *reh den Paris Adult Theatre I v. Slaten*, 419 US 887 (1974); *see also People v. Enskat*, 33 CA3d 900, 109 Cal Rptr 433 (1973); *State ex rel Keating v. Vixen*, 35 Ohio St 2d 215, 301 NE2d 880 (1973); *Marshall v. Ohio*, 419 US 1062 (1974); *State v. Watkins*, 262 SC 178, 203 SE2d 429 (1973), *app dis* 413 US 905 (1974); *State v. Bryant*, 285 NC 27, 203 SE2d 27 *cert den*, 419 US 974 (1974).

At least two states, Maryland and Washington, have upheld, under *Miller*, statutes that had no definition of obscenity at all: *Ebert v. Maryland Board of Censors*, 19 Md App 300 (1973), *cert den sub nom Ayre v. Maryland*, 419 US 1073 (1974); *State v. J-R Distributors, Inc.*, 82 Wash 2d 584, 512 P2d 1049 (1973), *cert den* 418 US 949 (1974).

Three state supreme courts have invalidated their state obscenity statutes under *Miller*. In *Stroud v. Indiana*, 257 Ind 201, 300 NE2d 100 (1973), the Indiana Supreme Court gave no discussion of their reason, and appear to have been under the impression that this Court had held their statute unconstitutional when it vacated and remanded for consideration in light of *Miller*. In *State v. Shreveport News Agency*, 287 S2d 464 (La 1973), the court held a *Roth*-type statute invalid under *Miller* and held it lacked the power to construe the statute to conform to *Miller*. Their reading of *Miller* was shown to be incorrect by *Hamling, supra*, decided after *Shreveport News Agency*. Likewise, in Florida, their supreme court refused to construe a *Roth*-type statute to adopt the *Miller* standards on the grounds that it would violate due process to do so after the conviction. *Pape v. State*, 281 S2d 600 (Dist Ct App Fla 1973). That case also was decided before *Hamling* and its position rejected by the United States Supreme Court in that case and in the state supreme courts listed above.

In sum, Oregon's statutory scheme, as written by the Oregon legislature, complies with the *Miller* standard and is limited to "hard core pornography."

Defendants also argue that even if the statute were constitutional, the standard applied by the trial judge in determining whether or not the movies were obscene was overbroad and unconstitutional. However, the grounds for an arrest of judgment are limited to lack of

authority of the grand jury and insufficiency of the indictment. ORS 136.500, 135.630, *State v. Foster*, 229 Or 293, 366 P2d 896 (1962).

When the Oregon Court of Appeals reviewed the denial of petitioners' motion in arrest of judgment, the only issue was whether the facts alleged in the indictment constitute a crime. The standard applied by the trial judge had nothing to do with the sufficiency of the indictment and could not make the denial of the motion in arrest of judgment an error since it is not grounds for an arrest of judgment.

The propriety of the standard applied by the trial judge is not an issue for review as an error in itself, for without an assignment of error, there is no issue for review. Supreme Court Rules of Procedure, Rules 6.18 and 6.55; *State v. Roach*, 99 Adv Sh 1953, — Or App ——, 526 P2d 1402 (1974).

Nor is the propriety of the trial judge's standard a subject for review by the United States Supreme Court. This Court has traditionally recognized the procedural rules of the various states with respect to the preservation of a question for review by an appellate court. If the supreme court of the state determines that an issue was not properly assigned as error under state procedural rules, that issue is *not* open to review by this Court. *Hulbert v. Chicago*, 202 US 275 (1906); *Flournoy v. Weirer*, 321 US 253 (1944); *Sanford v. Aisa*, 228 US 705 (1913).

Even if the standard applied by the trial judge were before this Court, it does not constitute error, but is in conformity with the requirement established by *Miller* and subsequent cases.

At the sentencing of defendants Liles and Bremner, the trial judge made the following remarks:

> "In watching those movies, you will recall that I made some comments about the language of the statute, the depicting in a patently offensive manner, or whatever it says to that effect. And I thought it seemed to be kind of strange sort of language, when you say 'depicting by film.' A film is not an objectional matter.
>
> "But I thought probably the purpose of the entire statute was to say the depiction of sex which is—or sexual conduct which is—patently offensive and that is the intent, I believe, of the Legislature, regardless of the grammatical manner in which they have stated it. And proceeding from that premise then, you say, 'Well, what is patently offensive?'
>
> "And, frankly, I had to kind of apply my own standard, which I *believe, corresponds with the standards of the community*. And the standard probably, simply stated and boiled down, is the same one that was taught to me by my mother from the day I was a small child. If there was something of which I would not want her to know, then don't do it. Pretty simple.
>
> "Applying that standard, I would think that I wouldn't get any quarrel out of anyone in this room, that they wouldn't want their mother sitting next to them while they looked at either one of these movies. *They are patently offensive.*" (Tr 11-13). (Emphasis supplied).

From these remarks, it is seen that the trial judge found that the movies in question were patently offensive by the standards of the community. The use by the

trial judge of colloquialisms in applying community standards does not invalidate his application of these community standards under *Miller*.

> ". . . A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. [citations omitted] . . .
>
> ". . . .
>
> "The result of the Miller cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case. . . ." *Hamling v. United States, supra,* 418 US at 105-106.

That is just what the trial judge has done.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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April, 1976

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of the United States

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The Oregon Attorney General errs in stating Oregon law does not allow a motion in arrest of judgment to be used to test the constitutionality of the criminal statute upon which the prosecution was based.

It is well established in Oregon that the issue of whether a criminal indictment or a civil complaint states facts sufficient to constitute a crime or a civil cause of action may be raised for the first time upon the appeal. *State* v. *Hopkins*, 227 Or. 395, 362 P.2d 378 (1961); *Johnson* v. *School Dist. 12*, 210 Or. 585, 312 P.2d 591 (1957).

This is essentially historical because the writ of error made the same challenge to the common law judgment roll, which included the pleadings, as did the general demurrer or motion in arrest of judgment. *Tellkamp* v. *McIlvaine*, 184 Or. 474, 189 P.2d 246 (1948); 1 Chitty on Criminal Law (Riley Ed.) 612-613 (*752), while by the Statute of Westminster II, 13 Edw. 1, c. 31 (1285), other challenges to the proceedings had to be imported into the record by a bill of exceptions taken in the trial court.

The reason given now is usually that the other objections — taken by a special demurrer — are curable. *State* v. *Holland*, 202 Or. 656, 666-667, 277 P.2d 386, 391 (1954).

Does such challenge — that the indictment fails to state facts sufficient to constitute a crime — include a challenge to the constitutionality of the statute upon which the indictment is founded? The answer is yes, although some of the decided cases have failed to distinguish whether the question of constitutionality was raised as to the statute upon which the pleading was founded or as to some other statute incidentally raised in the action.

> "Litigation may be likened to a syllogism wherein the major premise is the law of the land which need not be stated because it is already known to the court." *Dryden* v. *Daly*, 89 Or. 218, 223, 173 P. 667, 668 (1918).

> "Hence it is that a demurrer to a criminal complaint will bring before the court for consid-

> eration whether or not the acts charged, although within a legislative enactment defining a crime, are yet insufficient for the reason that the legislation itself is void." *State* v. *Nichols*, 77 Or. 415, 417, 151 P. 473 (1915).

> "The objection to the introduction of further evidence on the grounds that the statute on which the prosecution was based is unconstitutional and that the indictment did not state facts sufficient to constitute a crime is in effect a demurrer upon the latter ground." *State* v. *Berry and Walker*, 204 Or. 69, 72, 267 P.2d 993, 994, 267 P.2d 995, 282 P.2d 344, 282 P.2d 347 (1955).

In fact, the most recent decision of the Oregon Supreme Court invalidating a criminal statute was one in which the challenge in the trial was merely an objection on trial that the indictments did not state crimes, *State* v. *Hodges*, 254 Or. 21, 457 P.2d 491 (1969), Appellant's Brief, p. 5, which objection may be raised for the first time on appeal. *State* v. *Hopkins*, 227 Or. 395, 362 P.2d 378 (1961).

In equating the test for obscenity in a statute with "the little boy with his mother by his side" test (Petition pp. 8-9, Opposition p. 11) the Circuit Court interpreted the Oregon statute to cover situations impermissible under the standards set by the Supreme Court of the United States and so made the Oregon statutes unconstitutional.

Respectfully submitted,

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